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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

v.

SYLVESTER HARRIS,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN

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February 27, 1980

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CONSENT TO FILING OF
BRIEF AMICUS CURIAE

This brief is presented for the State of Wisconsin sponsored by its Attorney General at the request of the governor under authority of sec. 165.25(6), Wis. Stats. Accordingly, consent of parties to the case is not required.

INTEREST OF AMICUS CURIAE

The State of Wisconsin is interested in the issue of judicial immunity of its judges, as it has arisen in the above-captioned case. The state believes its participation as amicus curiae is especially important in that the significance of this case goes beyond the party litigants, and affects the interest of the State in the functioning and control of its trial judges. For that reason, the State of Wisconsin believes that the questions relating to judicial immunity may not be adequately presented by the parties, particularly as they relate to the functioning and control of its trial judges.

ARGUMENT

The State of Wisconsin urges this court to grant the petition for certiorari in the above-captioned case to settle important questions of vital interest to the State of Wisconsin.

The state submits a clear and direct resolution by this court of the issue of judicial immunity is necessary to the functioning of a proper and independent judiciary in the state. There are presently 181 circuit judges in this state, and there are at least 23 damage suits pending against these judges. The state is concerned that unless this court clearly resolves the issue of judicial immunity, the number of such suits will only increase and hamper the proper functioning of the judiciary.

In addition, the state submits a resolution of the issue of judicial immunity by this court will clarify the role of the private suit for damages in the disciplining and control of the state judiciary.

The constitution and laws of the State of Wisconsin provide for control of the state judiciary. Wisconsin Constitution art. VII, sec. 1, and sec. 17.06, Wis. Stats., provides judges may be removed by trial by the senate after impeachment by the assembly. Wisconsin Constitution art. VII, sec. 11, provides they may be reprimanded, censured or removed by the Wisconsin Supreme Court. Wisconsin Constitution art. VII, sec. 13 and sec. 17.09(4), Wis. Stats., provides for removal of judges by address of the senate and assembly. Section 757.85,

Wis. Stats., provides for creation of a Judicial Commission, and subsequent sections provide for investigation of allegations of misconduct or disability of judges, procedures for hearing and disposition by the Wisconsin Supreme Court. Finally, Wis. Const. art. XIII, sec. 12 and sec. 9.10, Wis. Stats., provides for removal of judges by recall vote of the people of Wisconsin.

The State is concerned that, unless this court resolves the issue of judicial immunity, the answerability of judges in the State of Wisconsin to sanctions other than those provided in its constitution and laws will not be clear, to the detriment of the proper functioning of the state judiciary.

CONCLUSION

The State of Wisconsin respectfully requests the court grant the petition

for certiorari to resolve questions of great significance to the State of Wisconsin.

Respectfully submitted,

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Dated February 27, 1980

APPENDIX

Wis. Const. art. VII, sec. 1:

Impeachment; trial. SECTION 1. [*As amended Nov. 1932*] The court for the trial of impeachments shall be composed of the senate. The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment. On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court. No judicial officer shall exercise his office, after he shall have been impeached, until his acquittal. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to evidence; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold any office of honor, profit or trust under the state; but the party impeached shall be liable to indictment, trial and punishment according to law. [*1929 J.R. 72, 1931 J.R. 58, vote Nov. 1932*]

Wis. Const. art. VII, sec. 11:

Disciplinary proceedings. SECTION 11. [*As created April 1977*] Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. No justice or judge removed for cause shall be eligible for reappointment or temporary service. This section is alternative to, and cumulative with, the methods of removal provided in sections 1 and 13 of this article and section 12 of article XIII. [*1975 J.R. 13, 1977 J.R. 7, vote April 1977*]

Wis. Const. art. VII, sec. 13:

Justices and judges: removal by address. SECTION 13. [*As amended April 1974 and April 1977*] Any justice or judge may be removed from office by address of both houses of the legislature, if two-thirds of all the members elected to each house concur therein, but no removal shall be made by virtue of this section unless the justice or judge complained of is served with a copy of the charges, as the ground of address, and has had an opportunity of being heard. On the question of removal, the ayes and noes shall be entered on the journals. [*1971 J.R. 30, 1973 J.R. 25, vote April 1974; 1975 J.R. 13, 1977 J.R. 7, vote April 1977*]

Wis. Const. art. XIII, sec. 12:

Recall of elective officers. SECTION 12. [*As created Nov. 1926*] The qualified electors of the state or of any county or of any congressional, judicial or legislative district may petition for the recall of any elective officer after the first year of the term for which he was elected, by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by electors equal in number to at least twenty-five per cent of the vote cast for the office of governor at the last preceding election, in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty nor more than forty-five days from the filing of such petition. The officer against whom such petition has been filed shall continue to perform the duties of his office until the result of such special election shall have been officially declared. Other candidates for such office may be nominated in the manner as is provided by law in primary elections. The candidate who shall receive the highest number

of votes shall be deemed elected for the remainder of the term. The name of the candidate against whom the recall petition is filed shall go on the ticket unless he resigns within ten days after the filing of the petition. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. This article shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict or impair the right of recall. [*1923 J.R. 73, 1925 J.R. 16, 1925 c. 270, vote Nov. 1926*]

Sec. 9.10, Wis. Stats:

9.10 Recall. (1) The qualified electors of the state, of any county, city, village, town, or of any congressional, legislative, judicial or school district may petition for the recall of any elective official after the first year of the term for which the official is elected by filing a petition with the same official or agency with whom the petition for nomination to the office was filed demanding the recall of the officeholder. The petition shall be signed by electors equal to at least 25% of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. If at the last election any group of candidates were voted for in common to fill 2 or more offices of the same designation, the required number of petition signers shall be equal to 25% of the number computed by dividing the total vote for that office by the number of offices filled jointly.

(2) (a) The preparation and form of the recall petition shall be governed by s. 8.15. In addition, a recall petition for a city, village, town or school district office shall contain a specific statement of good and sufficient reason upon which removal is sought.

(b) After the recall petition has been offered for filing, no name shall be erased or removed. No signature shall be valid or counted unless the date is less than 60 days before the date offered for filing.

(3) (a) The provisions of this subsection apply for the recall of all elective officials other than city, village, town and school district officials. City, village, town and school district officials are recalled under sub. (4).

(b) Within 3 days after the petition is offered for filing, the official with whom the petition is left shall determine by careful examination whether the petition is sufficient and so state in a certificate attached to the petition. If the petition is found to be insufficient, the certificate shall state the particulars creating the insufficiency. The petition may be amended to correct any insufficiency within 5 days following the affixing of the original certificate. Within 2 days after the offering of the amended petition for filing, it shall again be carefully examined to determine sufficiency and a certificate stating the findings shall be attached. Immediately upon finding an original or amended petition sufficient, the official shall file the petition and call a special election to be held not less than 40 nor more than 45 days from the filing date.

(c) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns within 10 days after the original filing of the petition. There shall be no primary. Candidates for the office may be nominated under the usual procedure of nomination for a primary election by filing nomination papers not later than 5 p.m. 4 weeks preceding the election and have their names placed on the ballot at the special election.

(4) (a) For the recall of any city, village, town or school district official, the municipal clerk shall verify the eligibility of the respective signers and circulators, shall certify thereto and shall transmit the petition to the clerk of circuit court within 10 days of the filing date. The circuit court within 10 days after receipt of the petition shall determine by hearing whether the petition states good and sufficient reason for the

recall. The clerk of circuit court shall notify the incumbent of the hearing date. The person subject to recall and the petition circulators may appear by counsel and the court may take testimony with respect to the recall petition. If the circuit court judge determines the grounds stated in the petition and proof offered at the hearing show good and sufficient reasons for recall, the judge shall issue a certificate directing the governing body or school board to hold an election under this section. If the grounds stated in the petition and proof offered at the hearing do not show good and sufficient reason for recall, issuance of the certificate shall be denied. Any party aggrieved by the circuit court determination may appeal to the court of appeals within 10 days following the circuit court determination by filing a notice of appeal with the clerk of the court of appeals. An appeal under this section shall have preference on the court of appeals calendar. The appeal shall stay enforcement of a certificate issued by the circuit court until the court of appeals determines the appeal. The governing body or school board upon receiving the certificate from the circuit court shall call a special election not less than 50 nor more than 60 days from the date of the certificate. The special election for recall of more than one official may be held on the same day.

(b) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns before the deadline for filing nomination papers. Other qualified persons may become candidates by filing their nomination papers not later than 5 p.m. of the day 6 weeks before the day of the election. If the number of candidates including the incumbent, when he is a candidate, is more than twice the number of offices of that designation to be filled, a special primary shall be held. The incumbent's name shall not appear on the primary ballot. When a primary is held, the name of the person receiving the highest number of votes shall be placed on the special election ballot with the incumbent. When the incumbent is not a candidate, the 2 persons receiving the highest number of votes shall be placed on the special election ballot. When an election to recall more than one official of the same designation is held at the same time, the names of all candidates nominated

shall be grouped together on the ballot with instructions to vote for the number of offices to be filled.

(5) The official against whom a recall petition has been filed shall continue to perform the duties of his office until the result of the special election is officially declared. The person receiving the highest number of votes at the special election shall be declared elected for the remainder of the term. If the incumbent receives the highest number of votes he shall continue in office. If another receives the highest number of votes he shall succeed the incumbent if he qualifies within 10 days after receiving notification.

(6) After one recall petition and special election, no further recall petition shall be filed against the same official during the term for which he was elected.

(7) The purpose of this section is to facilitate the operation of article XIII, section 12, of the constitution and to extend the same rights to electors of cities, villages, towns and school districts.

Sec. 17.06, Wis. Stats.:

17.06 Removal state officers; impeachment; address. (1) Any civil officer of this state may be removed from office by impeachment for corrupt conduct in office, or for crimes and misdemeanors as provided in section 1, article VII of the constitution; and any supreme court justice or circuit court judge may also be removed from office by address of both houses of the legislature as provided in section 13, article VII of the constitution.

(2) In this section, "address" means a procedure for removal of a judge from office based on a document entitled "Address" which specifies charges against a judge alleging misconduct or that he is not physically or mentally qualified to exercise the judicial functions of his office. A copy of the address containing the charges against him shall be served upon the judge. The judge shall have the opportunity of being heard in his defense and he may be removed from office by address of both houses of the legislature if two-thirds of all members elected to each house concur therein.

Sec. 17.09, Wis. Stats.:

17.09 Removal of elective county officers. Elective county officers may be removed from office as follows:

(1) COUNTY CLERK; TREASURER; SURVEYOR; SUPERVISOR. The county clerk, county treasurer or surveyor, or a county supervisor, by the county board, for cause, by a vote of two-thirds of all the supervisors entitled to seats on such board.

(2) CLERK OF CIRCUIT COURT. The clerk of the circuit court, by the judge or a majority of judges of the circuit court for the clerk's county, for cause.

(4) JUDGES. The county judge, by address of both houses of the legislature in the manner provided in the constitution for the removal of justices of the supreme court or judges of the circuit courts.

(5) OTHER ELECTIVE COUNTY OFFICERS. The sheriff, coroner, register of deeds or district attorney, by the governor, for cause.

Sec. 165.25, Wis. Stats.:

165.25 Duties of department of justice. The department of justice shall:

(1) REPRESENT STATE. Except as provided in s. 59.47 (7), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either branch of the legislature, appear for the state and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people thereof may be interested. All expenses of the proceedings shall be paid from the appropriation under s. 20.455 (1) (d).

(2) PROSECUTE BREACHES OF BONDS AND CONTRACTS. Prosecute, at the request of the governor, or of the head of any department of the state government any official bond or any contract in which the state is interested, deposited with any of them, upon a breach thereof, and prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with any of their departments except in those cases where other provision is made.

(3) ADVISE DISTRICT ATTORNEYS. Consult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office.

(4) FURNISH LEGAL SERVICES; APPROPRIATION. The department of justice shall furnish all legal services required by the investment board, the department of transportation, the department of natural resources, the state teachers retirement board and the Wisconsin retirement fund board, together with such other services, including stenographic and investigational, as are necessarily connected with such legal work. The department shall at the end of each fiscal year, except for programs financed out of the general fund, render to the respective departments herein enumerated an itemized statement of the total cost of such legal and other services including travel expenses and legal expenses enumerated in s. 20.455 (1) (d). Upon receipt of such statement, the respective department head shall audit the same and upon finding it to be correct shall certify the amount thereof to the department of administration to be paid into the general fund out of the proper appropriation.

(5) PREPARE FORMS. Whenever requested by the head of any department of the state government, the department of justice shall prepare proper drafts of forms for contracts and other writings which may be wanted for the use of the state.

(6) ATTORNEY FOR STATE EMPLOYES. At the request of the head of any department of state government, the attorney general may appear for and defend any state officer or employe of the department in any civil action or civil proceeding brought against the officer or employe for or on account of any act growing out of or committed in the lawful course of the officer's or employe's duties. Witness fees or other expenses determined by the attorney general to be reasonable and necessary to the defense in the action or proceeding shall be paid as provided for in s.

885.07. The attorney general may compromise and settle the action as the attorney general determines to be in the best interest of the state. Members, officers and employes of the Wisconsin state agencies building corporation, the Wisconsin state public building corporation and agents of any department shall be covered by this section while acting within the scope of any written agreement entered into prior to the occurrence of any act which results in a civil action or civil proceeding.

(7) KEEP RECORD OF ACTIONS. The department shall keep a record of all actions and demands prosecuted or defended by the department on behalf of the state and all related proceedings. The department may dispose of public records in accordance with s. 16.61.

(9) PERFORM OTHER DUTIES. The department of justice shall perform all other duties imposed upon the department by law.

Sec. 757.85, Wis. Stats.:

757.85 Investigation; prosecution. (1) The commission shall investigate any possible misconduct or disability of a judge or justice. Misconduct constitutes cause under article VII, section 11 of the constitution.

(2) The commission may issue subpoenas to compel the attendance and testimony of witnesses and to command the production of books, papers, documents or tangible things designated in the subpoena in connection with an investigation under this section.

(3) The commission may notify a judge that the commission is investigating possible misconduct by or disability of the judge. Before finding probable cause, the commission shall notify the judge of the substance of the complaint or petition and afford the judge a reasonable opportunity to respond. If the judge responds, the commission shall consider the response before it finds probable cause.

(4) The commission may require a judge who is under investigation for disability to submit to a medical examination arranged by the commission.

(5) The commission shall upon a finding of probable cause that a judge has engaged or is engaging in misconduct, file a formal complaint with the supreme court. Upon a finding of probable cause that a judge has a disability, the commission shall file a petition with the supreme court. If the commission requests a jury under s. 757.87 (1), the request shall be attached to the formal complaint or the petition.

(6) The commission shall prosecute any case of misconduct or disability in which it files a formal complaint or a petition.

(7) Insofar as practicable, the procedures applicable to civil actions apply to proceedings under ss. 757.81 to 757.99 after the filing of a complaint or petition.